STATE OF NEW HAMPSHIRE SUPREME COURT 2012 TERM

No. 2012-0729

APPEAL OF THE LOCAL GOVERNMENT CENTER, INC. & a.

ASSENTED-TO MOTION FOR LEAVE TO FILE REPLY

Local Government Center, Inc. and its affiliated entities (collectively "LGC"), pursuant

to New Hampshire Supreme Court Rule 21(3-A), respectfully request permission to file a Reply

to the Bureau of Securities Regulation's Objection to Appellants' Motion for Stay Pending

Appeal ("Objection"). The proposed Reply, attached hereto as [Proposed Pleading Pending

Acceptance by the Court], foregoes a point-by-point response to the Bureau's Objection, as most

of the key points are adequately addressed in LGC's Motion for Stay Pending Appeal and

Appeal by Petition. Instead, the proposed Reply simply corrects a few significant misstatements

in the Objection of which the Court should be aware.

Respectfully submitted,

LOCAL GOVERNMENT CENTER, INC., et al

By Their Attorneys:

Dated: November 1, 2012

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CERTIFICATE OF SERVICE

I certify that on the 1st day of November, 2012, I filed an original and one printed copy of the foregoing *Motion for Leave to File Reply* with the New Hampshire Supreme Court, forwarded one copy of this pleading *via* U.S. mail or E-mail to all counsel of record.

Brian M. Quirk, Esq.

CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 21(5)

Counsel for the Bureau of Securities Regulation assented to the relief requested by this Motion, on October 31, 2012.

Brian M. Quirk, Esq.

STATE OF NEW HAMPSHIRE SUPREME COURT 2012 TERM

No. 2012-0729

APPEAL OF THE LOCAL GOVERNMENT CENTER, INC. & a.

[PROPOSED PLEADING, PENDING ACCEPTANCE BY THE COURT]

LGC'S REPLY TO THE BUREAU OF SECURITIES REGULATION'S OBJECTION TO APPELLANTS' MOTION FOR STAY PENDING APPEAL

Local Government Center, Inc. and its affiliated entities (collectively, "LGC") disagree with much that is said in the Bureau of Securities Regulation's Objection to Appellants' Motion for Stay Pending Appeal ("Objection"). The Objection is rife with factual errors and misleading statements. Nevertheless, this Reply will correct only a few key misstatements in the Bureau's Objection.

The Bureau Mischaracterizes the Standard for a Finding of Irreparable Harm. As the Bureau itself observes, "[t]he considerations for whether to grant a stay of an administrative order are generally similar to those applied to a preliminary injunction." Objection at 3. One of the considerations supporting a preliminary injunction or a stay pending appeal is that there be an "immediate danger of irreparable harm" to the parties seeking relief. *UniFirst Corp. v. City of Nashua*, 130 N.H. 11, 14 (1987)(quotation marks omitted). The Bureau goes on, however, to misapply the irreparable harm standard.

The *Providence Journal* case, cited by both parties, deals with one particular type of irreparable harm: the threatened public release of nonpublic information. *See Providence Journal Co. v. FBI*, 595 F.2d 889 (1st Cir. 1979). But that is not the only form irreparable harm may take. In *Unifirst*, for example, this Court found that the irreparable harm requirement was

met where revocation of the plaintiff's wastewater discharge license "would cause [the plaintiff] to close down its plant for ten days, resulting in a significant loss of business and the lay-off of employees." 130 N.H. at 15. Rather than the "cat was out of the bag" type of injury (as the Bureau puts it) at issue in *Providence Journal*, the irreparable harm LGC faces if a stay is not granted is akin to the irreparable harm in *Unifirst* – a "significant disruption" to LGC's business. *Id.*; see also Appeal of the University System of New Hampshire (N.H. Public Employee Labor Relations Board), 120 N.H. 853, 856 (1980) (merely "to subject [an] employer to the expense and disruption of undertaking negotiations" with putative labor union "may constitute irreparable harm to the employer").

Moreover, this Court has held that injunctive relief may be warranted where there is a potential due process violation. See Thompson v. N.H. Bd. of Medicine 143 N.H. 107, 109-110 (1998) (citing UniFirst Corp. v. City of Nashua, 130 N.H. at 14-15) (a court may intervene in an administrative process where a party raises a violation that fundamentally impedes the fairness of the proceedings). LGC has identified several due process violations which support its request for a stay pending appeal. See Appeal by Petition at 3-4 and 5. As for the Bureau's suggestion that the impending harm to LGC amounts only to "traditional economic damages" that "can be remedied by compensatory awards" (Objection at 6)(quotation marks omitted), LGC is unaware of any potential source of such a damages award in the event it prevails on its appeal.

The Bureau Mischaracterizes the Applicable Standard of Review. While the Bureau points to a "presumption of reasonableness afforded to administrative decisions" (Objection at 3), LGC's Appeal focuses on the errors of law contained in the Presiding Officer's Order. This Court's review of questions of law is *de novo*. See Appeal of Lowy (N.H. HHS), 156 N.H. 57, 60 (2007) ("[W]e will reverse the agency . . . if it made an error of law We review

questions of law de novo."); see also Appeal of Lorette (N.H. Comp. Appeals Bd.), 154 N.H. 271, 272 (2006)("[I]nterpretation of a statute [by New Hampshire Compensation Appeals Board] is a question of law, which we review de novo."). No "presumption of reasonableness" can save the Presiding Officer's decisions to the extent that they rest on errors of law.

The Bureau's Claim to the Contrary, LGC Preserved its Argument for the Presiding Officer's Recusal. LGC raised its recusal argument orally when it became aware of the grounds for such a request. Transcript of Administrative Hearing ("Tr.") at 2305-2319. Thereafter, LGC filed a Memorandum in Support of Oral Motion for Withdrawal of Presiding Officer on May 30, 2012. After the Presiding Officer failed to disqualify himself, LGC raised the issue again in its Motion for Reconsideration of Final Order on September 14, 2012. In light of LGC having raised the issue in an oral motion prior to the conclusion of the hearing and then in two written pleadings, the Bureau's argument that LGC waived this issue (see Objection at 18-19) lacks merit.

Arguments Made Unsuccessfully Below are Precisely the Point of an Appeal. The Bureau's repeated protestation that LGC is "reviving stale arguments already raised and rejected by the Presiding Officer" is misplaced. See Objection at 26; see also id. at 27 ("Once again, LGC's argument retreads familiar ground"). It is precisely the point of an appeal to revive arguments that were made and rejected below. Indeed, if LGC were making arguments that had not been raised and rejected by the Presiding Officer, the Bureau would presumably be arguing that LGC had waived such points.

Respectfully submitted,

LOCAL GOVERNMENT CENTER, INC., et al By Their Attorneys:

| Dated: | November | . 2012 | By: |
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CERTIFICATE OF SERVICE

I certify that on the ____ day of November, 2012, I filed an original and eight printed copies of the foregoing LGC's Reply to the Bureau of Securities Regulation's Objection to Appellants' Motion for Stay Pending Appeal with the New Hampshire Supreme Court, forwarded one copy of this pleading via U.S. mail or E-mail to all counsel of record, and forwarded two copies to the New Hampshire Bureau of Securities Regulation.